In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1278

EDWARD A. WILD, JR. and LOUIS CORRADO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of mailing obscene matter and of conspiring to do so, in violation of 18 U.S.C. 1461. Petitioner Wild was sentenced to two years' imprisonment; petitioner Corrado to two years' probation. The court of appeals affirmed (Pet. App. 1a-9a), and thereafter denied a petition for rehearing with a further *per curiam* opinion (Pet. App. 10a-14a). In maintaining that petitioners' convictions were

correctly upheld by the court below, we rely primarily upon the comprehensive opinions written by that court. Some additional discussion would, however, appear to be in order.

1. A principal contention made by petitioners is that the government's proof on the issue of obscenity was insufficient, since the government relied on the materials themselves and did not introduce expert testimony. As the court of appeals properly concluded, the Constitution does not require the government to "produce expert testimony about appeal to the prurient interest and contemporary community standards in every obscenity case" (Pet. App. 3a). In the present case, the court below correctly found that there was no such necessity since the materials themselves constituted "hard core pornography" (Pet. App. 4a). The materials involved here were color slides, not written or printed matter. As described by the court below, the first group of slides "presented a nude male, seated or lying facing the camera, holding or touching his erect penis. The second group of slides depicts two nude males in the act of fellatio" (Pet. App. 2a). There was in these circumstances no need for expert help to enable the jury to decide the issues of patent offensiveness, redeeming social value and appeal to prurient interest of the clearly defined class (*i.e.*, homosexuals) for which the slides were intended. See *Ginzburg* v. *United States*, 383 U.S. 463, 465; *Mishkin* v. *New York*, 383 U.S. 502.[1] As this Court made clear in

[1] We note that petitioners' challenge to the trial court's instructions (see Pet. 8, 13-15) was correctly rejected by the

Stanley v. *Georgia*, 394 U.S. 557, the decision in that case does not give First Amendment protection to "commercial distribution of obscene material" (394 U.S. at 563-564).

2. Petitioners' second major contention is that the seizure of the color slides (and other evidence such as rubber stamps, customer orders and order forms) —which took place prior to the decision in *Chimel* v. *California*, 395 U.S. 752—was unlawful. The seizure of material introduced at trial took place in petitioners' apartments incident to their arrests, which were made pursuant to bench warrants. The officers did not possess a search warrant. Petitioners contended below and argue here that the Constitution forbids the seizure of *any* allegedly obscene articles and associated evidence incident to arrest.[2] The court of appeals held that, under the standards prevailing before the *Chimel* decision, neither the Fourth nor the First Amendment absolutely prohibited the

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court below since not raised at trial (Pet. App. 6a). At all events, the instruction was proper under *Ginzburg* v. *United States*, *supra*.

[2] Petitioners also allege that the seizure in this case was improper because "massive" in scope under such cases as *A Quantity of Books* v. *Kansas*, 378 U.S. 205, and *Marcus* v. *Search Warrant*, 367 U.S. 717. As the court of appeals pointed out, however (Pet. App. 13a-14a), petitioners raised no claim regarding the extent of the seizure as opposed to the the legitimacy of *any* seizure, "small or massive," until their petition for rehearing below. In these circumstances, the court below, finding the record inadequate on this issue, properly declined to pass upon this fact-related contention, and the question is thus not appropriately before this Court (Pet. App. 10a-14a).

seizure of obscene material and related articles, such as those involved here. The court below then proceeded to sustain the instant seizure, holding that *Chimel* was not retroactive in effect and that the scope of the search and seizure here did not exceed permissible bounds under previous decisions (*e.g.*, *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145).

In our view, the court below correctly applied the basic holding in *Chimel*—that, in ordinary circumstances, officers may incident to an arrest search for and seize only objects in an area immediately adjacent to an arrestee—in a wholly prospective fashion. We recognize, however, that the question of the retroactivity of *Chimel* is presently pending in *Elkanich* v. *United States*, No. 1142, this Term, certiorari granted, February 2, 1970, and *Williams* v. *United States*, No. 1125, this Term, certiorari granted, March 23, 1970.[3] Accordingly, the Court may wish to defer action on the present petition until after *Elkanich* and *Williams* have been decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1970.

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[3] *Elkanich* involves a collateral attack on a conviction which had become final before *Chimel* was decided. *Williams*, however, presents the question of the retroactivity of *Chimel* in a case, like the instant one, that was on direct review when *Chimel* was decided (and of course is still on direct review).

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